IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.452 OF 1995

1. Jayashree Baburao Lagad ]
Age 28 years, Occ: ]
Business, residing at ]
102/36, Bhavani Peth ]
Sholapur. ]
]
2. Arjun Swaminath Kshirsagar]
Age 30 years ]
Occ: Service, residing at ]
986, North Kasba, ]
Sholapur. ]..Appellants
(Ori.Accused
Nos.1 & 4)

Versus

State of Maharashtra ]..Respondent

....

Mr.Sunil Kadam, Advocate for the Appellants
Mr.A.S.Shitole, A.P.P. for the State.

....

**CORAM: SMT.V.K.TAHILRAMANI,J.**

**DATE : OCTOBER 16,2004**

**ORAL JUDGMENT:**

1. Through this appeal, the appellants-original accused nos.1 and 4 challenge the judgment and order dated 25th August, 1995, passed by the learned Additional Sessions Judge, Sholapur in Sessions Case No.277 of 1993. By the said judgment and order, the learned Additional Sessions Judge acquitted the appellants of the offence under Section 302 read

with section 34 of IPC. However, he convicted both the appellants for the offence under Section 306 read with Section 34 of IPC and sentenced them to suffer R.I. for two years each and to pay a fine of Rs.300/- each i.d. R.I. for one month. In addition thereto, appellant no.2 i.e. original accused no.4 was also convicted under Section 498-A of IPC and sentenced to suffer R.I. for one year and to pay a fine of Rs.300/- in default of payment of fine R.I. for one month. The learned Judge directed that both the substantive sentences of accused no.4 shall run concurrently.

. It may be stated here that both the appellants were prosecuted along with two other accused persons i.e. Dattatraya Babanrao Lagad original accused no.2 and Shilpa Siddheshwar Honrao original accused no.3. Dattatray Lagad was the brother of original accused no.1 and Shilpa Honrao was the friend of original accused no.1. Both the accused persons were charged for the offence under Section 302 read with Section 34 of IPC. However, both of them came to be acquitted of the offence under Section 302 read with Section 34 of IPC.

2. Briefly stated the prosecution case is as under:

. Deceased Yogita was married to appellant no.2 Arjun Kshirsagar about two years prior to the incident. After the marriage, initially she was residing with her in laws and thereafter, she started residing with her husband at Punewada, Solapur. Appellant no.2 Arjun had an affair with appellant no.1 Jayashree and on account of that there were quarrels between Yogita and appellant no.2 Arjun. On account of these quarrels, on 15th June, 1993 at about 3 p.m., accused no.1 Jayashree poured kerosene on her person and set her on fire. Yogita was taken to the hospital. There a dying declaration (Exhibit-37) came to be recorded. The said dying declaration was treated as F.I.R. Thereafter, the investigation commenced. Yogita died on 21st June, 1993. Thereafter, post-mortem was conducted. The cause of death is given as ‘shock and toximiya due to 90% burns.’ After completion of investigation, the charge sheet came to be filed.

3. In due course, the case came to be committed to the Court of Sessions for trial. Charge came to be framed against all the four accused under Section 302 read with section 34 of IPC. In addition thereto, charge under Section 498-A of IPC came to

be framed against appellant no.2 i.e. original accused no.4. All the accused pleaded not guilty and claimed to be tried.

4. During the course of trial, the prosecution examined fourteen witnesses. P.W.2 Nilesh Ratilal Bhandari, P.W.3 Shubhangi Ratilal Bhandari and P.W.4 Rajshekhar Shankarrao Khune are the neighbours of the deceased Yogita. P.W.5 Bhagirathi Ramchandra Mhamane is the Special Executive Magistrate. P.W.6 Nirmala Sarwade is the mother of the deceased Yogita. Some of the other material witnesses are P.W.10 Abdul Razzak Balasaheb Shaikh and P.W.11 Police Constable Vijaysing Rajsing Rajput. After going through the evidence adduced by the prosecution, the learned Sessions Judge acquitted all the four accused of the offence under Section 302 read with Section 34 of IPC. However, he convicted the present appellants under Section 306 read with Section 34 of IPC. In addition thereto, the appellant no.2 was convicted under Section 498-A of IPC. Hence, this appeal.

5. I have heard Mr.Sunil Kadam, learned Advocate for the appellants and Mr.A.S.Shitole, learned A.P.P. for the State. I have perused the entire record of this case including the judgment and order

of the learned Sessions Judge. After carefully perusing the evidence, I am of the opinion that the conviction of the appellants under Section 306 read with Section 34 of IPC cannot be sustained.

6. When the appellant no.2 was put up for trial, charge against him and other accused under Section 302 read with Section 34 of IPC, was framed. However, the learned Judge acquitted all the accused persons of the offence under Section 302 read with Section 34 of IPC and convicted both the appellants under Section 306 read with Section 34 of IPC. The conviction under Section 306 read with Section 34 deserves to be quashed for the simple reason that having acquitted both the appellants of the charge under Section 302 of IPC, the learned Judge could not have convicted both the accused for the offence under Section 306 of IPC. It is pertinent to note that in the present case, no alternative charge has been framed under Section 306 of IPC. It is true that Section 222 Cr.P.C. entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 of IPC within the meaning of Section 222 of Cr.P.C. as the two offences are of distinct and different

categories. While the basic constituent of an offence under Section 302 of IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof. This view has also been taken by the Supreme Court in the case of **Sangaraboina Sreenu Vs. State of A.P. reported in (1997) 5 S.C.C.348.** In such case, it is held that the appellant was charged and tried for the offence under Section 302 of IPC, his conviction under Section 306 of IPC, since it was a minor offence in relation to the offence under Section 302 of IPC, was held to be illegal and set aside as the basic constituent of the two offences are distinct and different. In the present case, no charge was framed under Section 306 of IPC nor on reading the charge as framed can it be said that the accused persons were put to any notice that they had to defend themselves in respect of an offence under Section 306 IPC. As such, both the accused did not have any opportunity to lead their defence and successfully defend themselves in respect of the offence under Section 306 of I.P.C. In such case, the conviction of both the appellants under Section 306 of IPC, cannot be sustained and the same deserves to be set aside.

7. The appellant no.1 has been convicted only for the offence under Section 306 read with Section 34

of IPC. However, the appellant no.2 who was the husband of Yogita, was also convicted under Section 498-A of IPC. I shall now proceed to examine whether there is sufficient evidence to uphold the conviction of appellant no.2 for the offence under Section 498-A of IPC.

8. To prove offence under Section 498-A of IPC, the prosecution has mainly relied on the evidence of P.W.6 Nirmala Anantrao Sarwade who is the mother of Yogita. Nirmala Sarwade has stated that her daughter was married to the appellant no.2. She has further stated that two months after the marriage, deceased Yogita told her that accused no.4 i.e. appellant no.2 had illicit relations with accused no.1-Jaishree i.e. appellant no.1. She has further stated that she used to go to Yogita's house after 2-3 days. Whenever, she used to go to deceased Yogita's house, Yogita told her that accused no.4 i.e. appellant no.2 used to harass her because of accused no.1-Jaishree. Nirmala Sarwade has further stated that on the day of incident, she was at home. Her husband came house at about 4 p.m. and told her that accused no.1 set Yogita on fire. She immediately went to the hospital to see Yogita. At that time, accused nos.1 to 3 were near the cot of deceased Yogita. When Nirmala entered into the room

of Yogita in the hospital, accused nos.1 to 3 left the room. Yogita told her that accused nos.1 to 3 are threatening her and asked her to say that she got burn because of flames of stove, otherwise they will kill her son. However, on going through the cross-examination of this witness, all these averments in her examination in chief were proved to be omissions. The only evidence which remains is that whenever this witness used to go to Yogita's house, there used to be always quarrel between Yogita and her husband. On 14.6.1993, there was naming ceremony of the son of Yogita. Accused no.1 i.e. Jayashree was present in the naming ceremony. On that day, appellant no.2 i.e. husband of Yogita brought 'sari' for Jayashree. Because of that, there was quarrel in between Yogita and her husband. Her husband i.e. appellant no.2 abused Yogita in filthy language and asked her to keep quiet. It is not the case of the prosecution that appellant no.2 Arjun Swaminath Kshirsagar was present at home when Yogita caught fire. In fact, Yogita has taken a contradictory stand as far as the incident is concerned. She has told her mother that Jayashree poured kerosene on her and set her on fire. So also in dying declaration (Exh. 37), Yogita has stated that Jayashree poured kerosene on her person and set her on fire. However, when immediately after Yogita

caught fire, on hearing shouts, the neighbours i.e. P.W.2 Nilesh Ratilal Bhandari, P.W.3 Shubhangi Ratilal Bhandari and P.W.4 Rajshekher Shankarrao Khune came there, Yogita did not state to these witnesses that Jayashree poured kerosene on her and set her on fire. But she has only stated that Jayashree has spoiled her life. Thereafter, Yogita was taken to the hospital. When P.W.10 Abdul Razzak Balasaheb Shaikh made enquiries with her, Yogita made oral dying declaration to this witness that accused Jayashree i.e. appellant no.1 set her (Yogita) on fire. P.W.10 Abdul Razzak has further stated that because of Jayashree who is friend of her husband, her husband abused her the entire night and hence, she set herself on fire. So also, P.W.2 Nilesh Bhandari and P.W.4 Rajshekhar Khune have stated that since 10 to 15 days prior to the incident, there used to be quarrel between the deceased Yogita and her husband. As stated earlier, the dying declaration (Exh.37) of Yogita, came to be recorded by P.W.5 Bhagirathi Mhamane, Special Executive Manager. In the said dying declaration, she has stated that her husband abused her and illtreated her. Thus from the evidence of P.W.2 Nilesh Bhandari, P.W.4 Rajshekhar Khune, P.W.5 Bhagirathi Mhamane, P.W.6 Nirmala Sarwade, and P.W.10 Abdul Razzak, the prosecution has brought on

record that the appellant no.2 Arjun illtreated his wife and treated her with cruelty. Thus, in my view, the learned Judge has rightly convicted the appellant no.2 Arjun for the offence under Section 498-A of IPC. In view of the above, the conviction of the appellant no.2 under Section 498-A of IPC deserves to be maintained.

9. At this stage, the learned advocate for the appellants has submitted that the incident had occurred more than 11 years ago and the father of appellant no.2 has expired recently and the family members of the appellant no.2 consisting of his old mother, four young siblings are dependent on him. Thus, he has submitted that appellant no.2 Arjun is the only bread earner in his family and all his family members are dependent on him. Thus, the learned advocate for the appellants has submitted that sentence imposed on the appellant no.2 for the offence under Section 498-A of IPC,may be reduced to the period already undergone by him and the appellant no.2 is willing to pay higher amount of fine.

10. Looking to the above facts, I am inclined to reduce the sentence of imprisonment under Section 498-A of IPC to the period already undergone by the

appellant no.2. However, I am inclined to increase the fine amount of Rs.300/- to Rs.30,000/-. In default of payment of fine, appellant no.2 to suffer R.I. for nine months.

11. In view of the above, the judgment and order of conviction and sentence for the offence under Section 306 read with Section 34 of IPC against both the appellants, passed by the learned IInd Additional Sessions Judge, Solapur in Sessions Case No. 277 of 1993, dated 25th August, 1995, is set aside. The judgment and order of conviction for the offence under Section 498-A of IPC against the appellant no.2 Arjun Kshirsagar is confirmed. However, the sentence of imprisonment for the offence under Section 498-A of IPC is reduced to the period of imprisonment already undergone by the appellant no.2. Appellant no.2 is sentenced to pay additional fine of Rs.29,700/- i.e. total fine of Rs.30,000/-(Rs. Thirty thousand only). In default of payment of fine, R.I.for nine months. It is stated on behalf of appellant no.2 that fine amount for the offence under Section 498-A of IPC as imposed by the learned Judge, has been deposited by the appellant no.2 before the trial Court. On the request of learned advocate for the appellant no.2, four weeks time is granted from today to the

appellant no.2 to deposit before the trial court additional fine amount of Rs.29,700/-.

. Appeal is partly allowed in the above terms.

[V.K.TAHILRAMANI.J]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
**CRIMINAL APPEAL NO.452 OF 1995**
( Jayashree Lagad and Other Vs. The State of Maharashtra )

| Office Notes, office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders | Court's or Judge's orders |
|---|---|

Mr.Sunil Kadam, Advocate for Appellants
Shri.A.S.Shitole, A.P.P. for State

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : OCTOBER 16, 2004

. For the reasons mentioned separately in the judgment, the following order is passed:

. The judgment and order of conviction and sentence for the offence under Section 306 read with Section 34 of IPC against both the appellants, passed by the learned IInd Additional Sessions Judge, Solapur in Sessions Case No. 277 of 1993, dated 25th August, 1995, is set aside. However, the judgment and order of conviction for the offence under Section 498-A of IPC against the appellant no.2 Arjun Kshirsagar is confirmed. The sentence of imprisonment for the offence under Section 498-A of IPC is reduced to the period of imprisonment already undergone by the appellant no.2. Appellant no.2 is sentenced to pay additional fine of Rs.29,700/- i.e. total fine of Rs.30,000/-(Rs.Thirty Thousand only). In default of payment of fine, R.I.for nine months. It is stated on behalf of appellant no.2 that fine amount for the offence under Section 498-A of IPC as

imposed by the learned Judge, has been deposited by the appellant no.2 before the trial Court. On the request of learned advocate for the appellant no.2, four weeks time is granted from today to the appellant no.2 to deposit before the trial court additional fine amount of Rs.29,700/-.

. Appeal is partly allowed in the above terms.

[V.K.TAHILRAMANI,J.]